

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 In Re: METHYL TERTIARY BUTYL  
4 ETHER ("MTBE") PRODUCTS  
5 LIABILITY LITIGATION

00 Civ. 1898 (SAS)

6 New York, N.Y.  
7 October 15, 2015  
8 3:00 p.m.

9 Before:

HON. SHIRA A. SCHEINDLIN

District Judge

11 APPEARANCES

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Also Present:

ROBERT WILSON  
MEGHANA SHAH  
STEPHAN DILLARD (tel.)  
LISA MEYER (tel.)  
RANDY GRAY (tel.)

(Case called)

THE COURT: We are here today for oral argument on two pending motions. They both turn on the this question that's been raised before and is being raised again about the tolling rules and which case out of Puerto Rico applies. These are defense motions.

There is a motion in Puerto Rico I for summary judgment, and two defendants, Shell Western Supply and Trading and Shell International Petroleum Company Ltd., are added by the third amended complaint, which was filed December 3, 2012. They move for summary judgment on the basis the statute of limitations had run by the filing of the third amended complaint.

They make this argument because they say that the Puerto Rico high court case of Fraguada, which was decided August 13, 2012, controls and says there can't be the unlimited tolling of the earlier case, Arroyo, but that going forward the one-year period applies.

The other motion is in Puerto Rico II. There has never been a decision yet in the Puerto Rico II case. The Puerto Rico II case alleges injury of 36 new service station sites. It also requests islandwide relief similar to that requested in Puerto Rico I.

The current motion in Puerto Rico II alleges that the islandwide claims are duplicative of those that were raised in

1 Puerto Rico I and should be dismissed under the prior pending  
2 action doctrine. Defendants also say that the claims are  
3 time-barred as to the Puerto Rico II defendants that were in  
4 the Puerto Rico I complaint as well as the two defendants that  
5 are added for the first time in Puerto Rico II. So there are  
6 two grounds to be argued.

7 Given that these are defense motions and that the  
8 Puerto Rico I motions relate to Shell, would you like to begin  
9 the argument, Mr. Wallace?

10 MR. WALLACE: Thank you, your Honor, I would. May I  
11 begin with a question? I don't want to take your time  
12 rehashing the points that were presented in the papers. Unless  
13 you have questions, I presume that the chief issue that brings  
14 us here today concerns the prospective application of the  
15 Fraguada case.

16 THE COURT: That's true.

17 MR. WALLACE: Then let me start with that. I know I'm  
18 making a point that is altogether too familiar with you because  
19 you have decided this issue now, as we view it, on three  
20 different occasions: Two motions to dismiss, which were  
21 granted, and a motion for reconsideration.

22 It pleases me to be able to say as the first point of  
23 my argument that we believe you are absolutely right and don't  
24 see any reason to revisit, much less reverse, the decisions  
25 that you made previously.

1 THE COURT: Well, Mr. Wallace, it may trouble you to  
2 hear, as opposed to please you to hear, that I now have doubts  
3 that I was right on July 16, 2013, August 2, 2013, and December  
4 30, 2013. As I have read the developing cases coming down,  
5 primarily in Puerto Rico, and the reasoning in those cases and  
6 the consistency of those rulings, I now have reason to think  
7 that I got it wrong and that maybe I have to revisit and vacate  
8 and reverse my earlier rulings. One question I have for you  
9 is, I don't think any of them were reduced to final judgment.  
10 Is that true?

11 MR. WALLACE: To my knowledge, that's correct.

12 THE COURT: If that's true, then under rule 54(b) this  
13 Court would have power to revisit all of those rulings.

14 MR. WALLACE: Your Honor, I'll leave it to the  
15 defendants --

16 THE COURT: Who are in those cases to talk about that,  
17 right, I understand that. But the opening is certainly there.  
18 Since these motions raise the identical issue, I'm just saying  
19 if I was wrong then, I have an opportunity to be right now both  
20 on these motions and potentially with respect to those. So I  
21 do want to hear a full merits argument, so to speak, and not  
22 have you just rely on the fact that, hey, you have ruled three  
23 times, there is no need to do anything more but to say I agree  
24 with myself, please sit down.

25 MR. WALLACE: Understood.

1 THE COURT: That's not where I'm thinking.

2 MR. WALLACE: Understood. I can appreciate that given  
3 the number of cases that have been presented, the Court would  
4 have some questions and, as you put it, perhaps doubts. I hope  
5 that a thorough review of those cases will lead you to  
6 conclude, of course, that you were correct.

7 I would like to begin not with the intervening cases  
8 but with Fraguada itself. That is the only word we have from  
9 the Puerto Rico supreme court. You may appreciate this  
10 already, but I was somewhat surprised to learn myself that the  
11 intermediate appellate courts in Puerto Rico have limited  
12 authority, if you will. I have asked Mr. Sanchez to be  
13 prepared to address this if the Court has questions about this  
14 point in particular.

15 My understanding is that the intermediate appellate  
16 courts in Puerto Rico, which are creatures of relatively recent  
17 origin, having been created in the '90s, are governed by a  
18 judiciary act which expressly states that they do not have the  
19 authority to essentially set the law in Puerto Rico, that their  
20 decisions have whatever precedential effect other courts,  
21 including even lower courts, in Puerto Rico choose to accord to  
22 them, but they do not have stare decisis effect even in those  
23 courts, much less in this court.

24 So, as we look at those intermediate appellate courts,  
25 we should bear in my mind that they may be instructive, you

1 might find them useful, but you certainly are not bound by  
2 them.

3 THE COURT: I accept that I am not bound.

4 MR. WALLACE: Correct. The Puerto Rico supreme court  
5 decision in Fraguada itself, however, is quite different in  
6 that that is the controlling decision.

7 THE COURT: For sure.

8 MR. WALLACE: I won't belabor your interpretation of  
9 that decision. But I will say, at least this was my  
10 impression, on comparing your decisions, in particular the  
11 August 2013 decision on reconsideration, with all the other  
12 decisions that the plaintiffs have brought before you, yours, I  
13 submit, contains the most thorough, incisive, and instructive  
14 analysis.

15 Many of those other decisions from the intermediate  
16 appellate courts simply say, almost in passing, Fraguada shall  
17 have prospective effect, and then teach us nothing more about  
18 what prospective effect means. I think Fraguada teaches us  
19 that prospective effect means that the rule announced in that  
20 case, as distinct from the Arroyo rule, shall apply to --  
21 paraphrasing, but I think I have this close to an exact  
22 quote -- all causes of action filed after the date of the  
23 Fraguada decision itself in August 2012.

24 THE COURT: Even if that were right, and I'm not sure  
25 that I agree with that any longer, but assuming it were right,

1 the third amended complaint was filed December 3rd, which is  
2 three and a half months later. If there is suddenly a one-year  
3 statute of limitations after the tolling ends --

4 There was tolling under Arroyo, we agree with that?  
5 When Arroyo existed, there was tolling. When Arroyo was  
6 controlling, there was tolling as to after-added defendants.  
7 That was the whole rule of Arroyo. Surely you agree with that.

8 MR. WALLACE: Honestly, I have not thought about that.  
9 I'm not sure I agree.

10 THE COURT: That's what Arroyo held. It was tolling.

11 MR. WALLACE: Yes, indeed, so long as the Arroyo rule  
12 remained in effect.

13 THE COURT: Correct, it was tolling. We are in  
14 agreement. The tolling doesn't end until Fraguada is issued.  
15 If Fraguada is issued August 13th, you get a year. So, even if  
16 you're right that anything filed a day after Fraguada is  
17 controlled by Fraguada, this third amended complaint is good  
18 because it was filed within three and a half months. So it is  
19 within the one year. That is something that occurred to me  
20 when I studied these motion.

21 I wasn't sure I was right at all because of the  
22 intervening Puerto Rico cases. But then I said, even if I was  
23 right, they get a year, they were tolled until Fraguada became  
24 the controlling decision. Up to then, Arroyo tolled. The  
25 tolling can't end when it was in effect. It has to end when



1 Fraguada comes down, and then you get a year.

2 MR. WALLACE: Unless you view it this way: In  
3 Fraguada the court abrogated the rule of Arroyo and said it  
4 shall not apply henceforth.

5 THE COURT: There you go, henceforth. You're tolled  
6 until it comes down.

7 MR. WALLACE: Perhaps you're reading more into  
8 Fraguada than the court intended.

9 THE COURT: I don't think so. Otherwise, you would  
10 have an injustice. When you read the intervening cases, there  
11 is this whole question of fairness and justice. Arroyo was in  
12 effect for a while there. You can't be barred the minute  
13 Fraguada comes down. You have to get the year at that point;  
14 otherwise, there is a complete unfairness. So I'm troubled.

15 MR. WALLACE: Two points. I believe that Fraguada  
16 instructed courts not to apply Arroyo again after the date of  
17 that decision. And, I submit, in granting the plaintiffs this  
18 tolling period based on Arroyo, you are applying Arroyo  
19 contrary to Fraguada.

20 THE COURT: I don't think so. I would be applying  
21 Fraguada if I say you have only a year. The next case we are  
22 going to turn to is the Puerto Rico II complaint filed  
23 September 4th. That actually is just over a year because  
24 Fraguada comes down August 13th. I have to have a different  
25 discussion with whichever counsel is going to argue Puerto Rico

1 II. But any way you slice it, Fraguada gives you a year and  
2 you are tolled until Fraguada comes down. So there is a real  
3 problem for you, Mr. Wallace.

4 MR. WALLACE: I do take your point. If you hold  
5 firmly to that position, I want the opportunity to think more  
6 about what the import is of that construction of Fraguada. If  
7 you permit me, perhaps we might submit a short letter following  
8 the hearing. And perhaps not. Perhaps we will agree with you  
9 if we accept the premise that Fraguada gives the plaintiffs the  
10 benefit of another year of tolling.

11 THE COURT: It virtually has to, because Arroyo gave  
12 you unlimited tolling, and that doesn't end until Fraguada  
13 comes down. So you have to have the year Fraguada gives you.  
14 I feel very strongly about this. Otherwise, you would have an  
15 injustice.

16 What I admire about you as a lawyer is at least you  
17 are open to think about what I am saying and not deciding here  
18 and now. You need to think about this idea. You may reject  
19 it, you may write a letter, you may say, gosh, she may be right  
20 about that. I don't know. But you need to think about it.

21 MR. WALLACE: Allow me just one more point on this  
22 particular subject. I appreciate what the Court is saying  
23 about fairness. It must be. But Fraguada also teaches us that  
24 Arroyo was inequitable, that it was unfair.

25 THE COURT: Yes, you're right. But it was there, on

1 the books, and everybody relied on it. That is the inter-  
2 mediate decisions that you say have little or no reasoning.  
3 I'm not sure I agree with a that. But all of them talk about  
4 the fairness of reliance, which is why they say when the  
5 amended complaint is filed later on, those folks have relied on  
6 Arroyo and can't be punished midstream, so to speak, for their  
7 fair reliance on a case from the highest court of Puerto Rico.

8 It was a supreme court case, it was controlling, and  
9 everybody had an opportunity to rely on the supreme court, just  
10 like we all rely on the United States Supreme Court until it  
11 overrules itself, which it has been prone to do lately. It  
12 shouldn't do that, but it has on very important issues. But  
13 OK.

14 MR. WALLACE: Then the question becomes, is there some  
15 sort of grace period?

16 THE COURT: Fraguada says one year.

17 MR. WALLACE: I don't recall that. I understand that  
18 is your construction. But what Fraguada tells us expressly is  
19 the Arroyo rule was unfair, it was unjust, and henceforth  
20 Arroyo is abrogated.

21 THE COURT: That's right, henceforth.

22 MR. WALLACE: Which I construe to mean from now on the  
23 plaintiff doesn't get the benefit of the extended tolling  
24 period that Arroyo already granted them. This commonwealth had  
25 more than a year already to add the defendants.

1 THE COURT: But they were operating it correctly,  
2 relying on Arroyo, that there was no time limit, that they  
3 could, whenever they learned of it or became aware of it, they  
4 could then file. They had the right to rely on Arroyo until  
5 the highest court of Puerto Rico said you no longer have that  
6 right. Then they have a year. At least that is my view.

7 MR. WALLACE: Understood.

8 THE COURT: But that is only one argument. We could  
9 also go back to the other argument that those intermediate  
10 courts in Puerto Rico are right: That even if it was more than  
11 a year, the Arroyo rule applies to cases that were filed before  
12 Fraguada; even as they proceed over the years post-Fraguada,  
13 they have a right to continue under the Arroyo rule because  
14 they were filed under Arroyo. We need to cover that, too.

15 MR. WALLACE: As I construe the total of 19 cases the  
16 plaintiffs cited, there are 5 that fit the description you just  
17 provided.

18 THE COURT: There are almost none the other way. You  
19 counted mine three times. So you said there are five going the  
20 other way. But three were mine. If I'm wrong once, I'm wrong  
21 three times. The other two, they really had no reasoning.  
22 They didn't say a word. They just said it's post-Fraguada, so  
23 it's time-barred, and didn't explain the reasoning at all.  
24 Those two are pretty weak. And I think they were by the same  
25 judge.

1 Again, it was three of mine and two of one other  
2 judge, so only two judges took that position. All the other  
3 judges who have read it said it would be fundamentally unfair  
4 for a case that was filed under the Arroyo regime to midstream  
5 come under the Fraguada regime. Interestingly, that doesn't  
6 apply to Puerto Rico II because Puerto Rico II is a newly filed  
7 case, filed post-Fraguada.

8 MR. WALLACE: Absolutely.

9 THE COURT: That's a different story. Are you arguing  
10 the Puerto Rico II motion also?

11 MR. WALLACE: On the Fraguada point.

12 THE COURT: Good. I think that is a different case.  
13 That is not an amended complaint. That is not an Arroyo filed  
14 case. That is a Fraguada filed case. Either it is timely or  
15 it is not within the one-year statute of limitations.

16 My only question on Puerto Rico is II is when the  
17 commonwealth knew or should have known about those 36 new  
18 sites. If it's timely within the year, it's got nothing to do  
19 with Arroyo or Fraguada; it's a statute of limitations argument  
20 under a one-year statute of limitations, no problem about that.  
21 But there I'm confronted with the islandwide claim.

22 MR. WALLACE: Exactly. That is the focus of the  
23 motion.

24 THE COURT: It doesn't talk about the 36 new claims?

25 MR. WALLACE: I don't believe so. I think we conceded

1 those --

2 THE COURT: I thought it said if the defendants are in  
3 Puerto Rico I and they are now in Puerto Rico II, even if it's  
4 on new sites --

5 MR. WALLACE: I believe that the defendants are  
6 reserving the right after discovery to move for summary  
7 judgment on limitations if it turns out that the evidence shows  
8 the commonwealth was aware of those sites.

9 THE COURT: Then it is barred because it was more than  
10 one year. But it is not because they were defendants in Puerto  
11 Rico I?

12 MR. DILLON: Your Honor, Michael Dillon. One of the  
13 points that we made in the Puerto Rico II motion to dismiss was  
14 that inasmuch as the commonwealth claims islandwide relief,  
15 they claimed that against the defendants in Puerto Rico I as  
16 well. So if you were on notice of your injury, you were also  
17 on notice of the amendment. Therefore, that islandwide relief  
18 claim is time-barred in Puerto Rico II as to the original  
19 defendants.

20 THE COURT: Because you knew of it for more than a  
21 year.

22 MR. DILLON: Right.

23 THE COURT: It has nothing to do with the Arroyo/  
24 Fraguada problem, it's because it's beyond the one-year statute  
25 of limitations.

1 MR. DILLON: That's right.

2 THE COURT: Do we have a Fraguada issue in Puerto Rico  
3 II for you to talk about?

4 MR. WALLACE: We don't really think so, for precisely  
5 the reason you suggested. The commonwealth might argue that  
6 the islandwide claims in Puerto Rico II were tolled by the  
7 assertion of those claims in Puerto Rico I.

8 THE COURT: But under my interpretation, they would  
9 have to lose that because it is more than one year after the  
10 Fraguada decision that they filed.

11 MR. WALLACE: Yes. Let me say just a few more words  
12 on the two cases that ruled consistent with --

13 THE COURT: The one judge, two cases.

14 MR. WALLACE: Well, two panels in two cases. In one,  
15 you are quite right that they didn't articulate much in the way  
16 of a rationale or reasoning. But in the Ocasio Nieves case,  
17 the first of the two, the amended complaint in that case was  
18 filed in May 2013.

19 THE COURT: Give me a minute to find it. I have notes  
20 on each of those. I want to get to that one. I'm sorry. Go  
21 ahead.

22 MR. WALLACE: In that case, as your notes may reflect,  
23 the amended complaint --

24 THE COURT: That's the Ocasio Nieves one?

25 MR. WALLACE: Yes.

1 THE COURT: Go ahead.

2 MR. WALLACE: The amended complaint at issue was filed  
3 in 2013. That's within one year of Fraguada. Nevertheless,  
4 the court held there that the claims were timed barred.

5 THE COURT: But it didn't consider the prospective  
6 language at all. It just said, we're applying Fraguada and  
7 that's the end of it.

8 MR. WALLACE: I think that's right fair, although it  
9 would be unfair to say they didn't mention whether --

10 THE COURT: They didn't mention it.

11 MR. WALLACE: Right. The other case, Cubero Aponte,  
12 this was October 2014, it's against the so-called triple A, the  
13 AAA.

14 THE COURT: I've got it.

15 MR. WALLACE: In that case, interestingly, it was the  
16 commonwealth, this very party, that sought and received  
17 dismissal based on Fraguada in a case where the original  
18 complaint and the amended complaint were both filed before  
19 Fraguada. So, the commonwealth's position in that case must  
20 have been that Fraguada applies to all questions of limitations  
21 presented after the date of that decision, even where the  
22 defendant was added to the case prior to Fraguada. They would  
23 go further, indeed they did go further, and obtain the benefit  
24 of that argument in this other case than we submit you need to  
25 go, further than you did go in the prior decisions.



1 THE COURT: Further in what sense?

2 MR. WALLACE: In holding that Fraguada can apply even  
3 where the newly added defendant was added before the date of  
4 Fraguada.

5 THE COURT: I have that issue?

6 MR. WALLACE: That's what the commonwealth argued.

7 THE COURT: But I don't have that issue.

8 MR. WALLACE: No, it's not before you. That's why I  
9 say they went further than you did before or you need to now.  
10 In urging that Fraguada applies, they must have construed  
11 "prospectively" to mean --

12 THE COURT: That's quite the leap, since they didn't  
13 mention the word "prospective." Again, they just didn't do it.  
14 I agree with you that you never know what a court considered in  
15 the privacy of its chambers. But the decision does not reflect  
16 any consideration of that language in either the Ocasio Nieves  
17 or Cubero Aponte case.

18 MR. WALLACE: Right. While we are still on the  
19 subject of these intermediate appellate decisions post yours,  
20 let me correct my earlier math. There are three cases that we  
21 previously construed as irrelevant because the original  
22 complaint and the amended complaint were both filed before  
23 Fraguada, and therefore it is unremarkable that the Court would  
24 conclude that Fraguada did not apply.

25 THE COURT: Correct.

1 MR. WALLACE: But in these three cases, the Court in  
2 its analysis addressed not merely the filing of the original  
3 complaint but also the date when the amended complaints were  
4 filed as, though there was some significance that attached to  
5 that. I think their analysis is consistent with both the  
6 position we are advancing and the decisions that you made  
7 previously.

8 THE COURT: I don't think so. I think they were just  
9 saying that's such an easy case, it shouldn't detain us any  
10 longer, that obviously Fraguada applies prospectively, it's  
11 this, and it can't apply to what happened before it issued. I  
12 think they were just saying those are so easy, there is not  
13 much to talk about.

14 MR. WALLACE: I agree with you. I'm not sure the  
15 commonwealth does, and I'm quite sure the commonwealth did not  
16 in that Cubero Aponte case. In any event, let me reiterate  
17 that these decisions, informative as they are, may be useful to  
18 you in your analysis, but they do not, in our view at least,  
19 constitute an intervening change of the law. Indeed, I don't  
20 think you would conclude that they constitute an intervening  
21 change in the law.

22 THE COURT: That is to say that is not a standard I  
23 need to meet. I don't have to prove an intervening change in  
24 the law in order to vacate and reverse my earlier decisions,  
25 which is not your argument today anyway because you are leaving

1 that to those lawyers. But I don't need to prove that. That  
2 is not my burden. The lawyers have to prove that in certain  
3 instances, but I don't. So that is not relevant to me.

4 A change in the law would have to come, as you said,  
5 from the legislature or the highest court, not from this non-  
6 binding intermediate court. I get that. But when you see the  
7 weight of authority developing, a judge -- I say "you." When a  
8 judge sees the weight of authority developing and you see five,  
9 seven, nine, whatever, cases all disagreeing with you, it's  
10 like a jury. When eleven people disagree with you, you stop  
11 and think.

12 We tell that to jurors all the time: When the  
13 majority disagrees with you, you should at least stop and  
14 think, could I be wrong? That is a standard charge of ours.  
15 That's what I'm doing. I'm stopping and thinking: You know,  
16 maybe I did that too quickly and too easily and I just said  
17 anything that happens after Fraguada is controlled by Fraguada;  
18 but it may not be that simple because you, the party, relied on  
19 Arroyo at least up until Fraguada issued, at least until then.

20 Some would argue if you are a pre-Arroyo filing there  
21 is not even a one-year statute, you're just tolled forever, as  
22 you were under Arroyo, and you may add parties today and it  
23 wouldn't matter. I may reach the intermediate notion that when  
24 Fraguada comes down, you are on notice your tolling years are  
25 over, now you get your one year; you had no reason to sue until

1 then because you were open and covered by the Arroyo ruling.

2 MR. WALLACE: I do appreciate, of course, your  
3 sensitivity to the fairness as you have described it that must  
4 be accorded to the commonwealth. But I hope you, too,  
5 appreciate that, as Fraguada itself teaches us, applying the  
6 Arroyo rule giving the commonwealth the benefit of tolling from  
7 2007 until 2012 plus another year works an injustice as well,  
8 this to the defendants.

9 THE COURT: I'm not sure that's fair. Arroyo  
10 controlled. Much as you might not have liked that rule, that  
11 was the law of the land in Puerto Rico.

12 MR. WALLACE: Understood.

13 THE COURT: Whether you liked it or not, were it being  
14 dealt an injustice, that was the law and everybody had a right  
15 or an obligation to live under it. What you find troubling is  
16 yet another year.

17 MR. WALLACE: Yes, exactly.

18 THE COURT: To me, to shut it down when you had no  
19 notice that you were under a limit seems unfair, too. You had  
20 no reason to act. You had Arroyo. You thought you were tolled  
21 until you decided to add parties. That was the law.

22 MR. WALLACE: I do appreciate it, but a couple of  
23 points to put this fairness issue in context. Arroyo, of  
24 course, applies, and Fraguada itself, only in the instance of  
25 joint and several liability --

1 THE COURT: Correct.

2 MR. WALLACE: -- among different defendants, and it's  
3 so. In this case, for example, on the Shell motion, if you  
4 were to decide that Arroyo does not apply in any respect and  
5 from the date of Fraguada on there is no benefit of tolling,  
6 that's how we construe it, the commonwealth would be deprived  
7 of the ability, based on the time-barred defense, to assert the  
8 claims against these two defendants who are allegedly jointly  
9 and severally liable for several sites. But they still have,  
10 by definition, other jointly and severally liable defendants  
11 responsible for the claims they assert; otherwise, we wouldn't  
12 even be talking about Arroyo applying any tolling.

13 THE COURT: I understand. You're saying they at least  
14 have one defendant, why do they need three.

15 MR. WALLACE: Exactly.

16 THE COURT: There is such an obvious answer to that, I  
17 won't bother explaining it to you.

18 MR. WALLACE: Let me spend just a moment or two on the  
19 cases, the five cases. I think I'm correct in saying five  
20 cases --

21 THE COURT: Oh, yes.

22 MR. WALLACE: -- by other courts, the one in Puerto  
23 Rico federal court and four intermediate appellate decisions,  
24 that, to put it in shorthand, go the commonwealth's way. I  
25 believe that the federal court did not really provide any

1 analysis that is useful to you, and comparing your decisions  
2 with it is hardly a fair comparison because your decisions  
3 include that thoughtful analysis and they do not.

4 THE COURT: Which one was that, by the way?

5 MR. WALLACE: Santiago-Lampon.

6 THE COURT: Thank you. Hold on, I want to read it.  
7 Go ahead.

8 MR. WALLACE: Then there are these that I will  
9 describe as similar in an important respect: Davis Davis, Diaz  
10 Diaz, and Lozada Maldonado. Diaz Diaz was one of the earlier  
11 ones, in September 2013.

12 THE COURT: I see it. Go ahead about those three.

13 MR. WALLACE: In each of those three, I submit the  
14 court conflated important terms that we believe actually  
15 dictate the result here. I have in mind the terms that  
16 Fraguada used when it said that henceforth or subsequently  
17 causes of action filed shall be decided in accordance with the  
18 rules that case announced.

19 Causes of action. As I construe that term, a cause of  
20 action is a claim, if you prefer, that is asserted, and in the  
21 instance of my clients asserted for the first time post-  
22 Fraguada. Those courts, each of them, construed the term to  
23 mean something different.

24 In Diaz Diaz, for example, the court actually quoted  
25 Fraguada and said that "The intention of Fraguada when stating

1 that," quote, 'hereinafter all causes of action according to  
2 article 1802 shall be adjudicated in accordance with the rules  
3 established herein,'" and now the Court goes on, "was to  
4 establish that this rule would apply to suits for damages filed  
5 after August 13th."

6 Therefore, it concluded that since no new suit had  
7 been filed in that case, the fact that the amended complaint  
8 was filed subsequently to Fraguada did not exempt it from the  
9 Arroyo rule. The court again construed causes of action to  
10 mean suits as though Fraguada would only apply in a case such  
11 as PR II, that is, a completely new suit.

12 THE COURT: Actually, I never found a date for the  
13 amended complaint in Diaz Diaz. The complaint was 2010, but I  
14 don't know that we have a date for the amended complaint.

15 MR. MARTINEZ: Your Honor, if I may, we went into the  
16 docket and found them. The dates are the original complaint on  
17 May 2010 and then the amended complaint on October 2012.

18 THE COURT: As you can see, it wasn't in the opinion,  
19 so you wouldn't have known when it was anyway.

20 MR. WALLACE: Right.

21 THE COURT: That would have been, within my  
22 interpretation, under the year. It was two months after  
23 Fraguada. Go ahead.

24 MR. WALLACE: Similarly, in that Lozada Maldonado  
25 case, the original complaint was 2011, the amended complaint

1 was 2013. The court again cites Fraguada, says that causes of  
2 action prosecuted on subsequent dates would be subject to  
3 Fraguada, but then goes on to say that in the case before it,  
4 the claim was filed before the supreme court established the  
5 new doctrine. I take it that reference to "claim" must mean  
6 the suit, that is, the original complaint, because it's plain  
7 from the facts that the amended complaint was filed after  
8 Fraguada.

9 THE COURT: But it may have added parties to a  
10 preexisting claim.

11 MR. WALLACE: Perhaps. But in that event I would  
12 consider that claim as asserted against the defendants to have  
13 been a new cause of action.

14 THE COURT: You are adding a parenthetical that isn't  
15 there. The claim may well have preexisted the filing of the  
16 amended complaint. What you are doing now is adding defendants  
17 to a preexisting claim.

18 MR. WALLACE: I think that is a fair construction.  
19 What is the cause of action? When was that filed? That's what  
20 Fraguada tells us determines whether Arroyo applies or  
21 Fraguada.

22 THE COURT: I think a cause of action and a claim are  
23 synonymous. It still raises the question of as against whom.  
24 There is a claim, let's say, of a defective product. The claim  
25 is there. It has one defendant. Now it suddenly has two more.



1 But the claim existed prior to Fraguada. Not as against the  
2 two new defendants, but it existed. It was claim three or  
3 claim seven in a complaint.

4 MR. WALLACE: That is a fair point. Now, if we look  
5 at that claim being amended to bring in new defendants, at that  
6 point I submit is when the cause of action against those new  
7 defendants was filed.

8 THE COURT: For sure.

9 MR. WALLACE: This court, I submit, was badly mistaken  
10 when it construed Fraguada to mean that it only applies to  
11 cases that are filed after Fraguada and not causes of action.  
12 That's how I interpret that case.

13 Likewise, if you look at the Davis Davis case, it says  
14 that Fraguada does not apply because the complaint was filed  
15 two years earlier, in 2010. I submit that, too, was an  
16 improper construction of Fraguada.

17 Granted, insofar as I can recall, none of these cases  
18 addressed the important point that you have raised, whether  
19 Fraguada allows yet another year after it is decided. I would  
20 be grateful if, as you think through this, you read the  
21 language at the end of Fraguada, which I take to mean the Court  
22 intended that its rule would apply from that date forward in  
23 all cases.

24 I understand it would help the commonwealth maybe  
25 reduce some what might otherwise be considered injustice to the

1 commonwealth. But likewise, it would work what the supreme  
2 court tells us was an injustice and inequity to the defendants.

3 THE COURT: Yes, but one that existed and that  
4 everyone relied on. It was the law of the land. Whether it  
5 was an unjust law or not, it was on the books and everybody  
6 relied on it during that time.

7 Once we get to repeating ourselves, that's a bad sign.  
8 I understand your arguments. How long would you like to submit  
9 this supplemental letter? Please don't say very long.

10 MR. WALLACE: It shouldn't take but a week for us to  
11 decide in reviewing the cases whether to submit one at all.

12 THE COURT: Next Friday, the 23rd?

13 MR. WALLACE: Perfect.

14 THE COURT: Maximum.

15 MR. WALLACE: Thank you.

16 THE COURT: Does anybody else from the defense side  
17 wish to be heard before I hear from the plaintiff's lawyer.

18 MR. DILLON: Michael Dillon. Your Honor, only if you  
19 wanted to hear more about the Puerto Rico II action or the  
20 motion to dismiss.

21 THE COURT: I do primarily with regard to the  
22 islandwide claim.

23 MR. DILLON: My question for your Honor is do you want  
24 to wrap up the Shell West motion first?

25 THE COURT: No.

1 MR. DILLON: Your Honor, I will quickly summarize at  
2 least our position on the islandwide relief sought in the  
3 Puerto Rico II complaint. The Court possesses the power to  
4 dismiss relief, not just claims. The relief sought here is  
5 duplicative to the extent they seek islandwide relief, prophylactic  
6 relief on an islandwide basis predicated on specific  
7 relief sites or receptor sites. They are seeking the same  
8 thing in Puerto Rico II only in this case for 36 sites, again  
9 seeking islandwide relief.

10 THE COURT: You're saying if somebody was a defendant  
11 in Puerto Rico I and is now a defendant in Puerto Rico II, that  
12 defendant was already the subject of a request for islandwide  
13 relief based on other sites but it's the same relief?

14 MR. DILLON: That is certainly the case, even for new  
15 defendants, your Honor. The prior pending action doctrine  
16 doesn't just apply to defendants in an original action. What  
17 the prior pending action doctrine says is that so long as there  
18 are not significant differences, in other words, between the  
19 claims, the relief sought, and the defendants --

20 THE COURT: There are by definition significant  
21 differences among the defendants if they weren't a defendant in  
22 a lawsuit, because no one knew they were potentially liable.  
23 If now they are a defendant because a new release at a new site  
24 was located, there is not overlap as to those new defendants.

25 MR. DILLON: Granted your Honor. Except that the case

1 law informing the prior pending action doctrine says as long as  
2 their interests were represented in the prior suit.

3 THE COURT: How could they be? They weren't a  
4 potentially liable party, so how were their interests  
5 represented?

6 MR. DILLON: I think in this instance plaintiffs seek  
7 islandwide relief. That will be defended against. Right?

8 THE COURT: Yes.

9 MR. DILLON: In the same action, the same relief is  
10 sought, just on a smaller section of sites. The doctrine says  
11 that you don't get to seek that relief twice.

12 THE COURT: I can see that as to the prior named  
13 defendants. I'm not sure I see it as to the newly named  
14 defendants.

15 MR. DILLON: Maybe I can say it better this way, your  
16 Honor. The prior pending action doctrine holds that the thing,  
17 in this case islandwide relief, will be adjudged in the first  
18 instance; therefore, it's duplicative in the second, it need  
19 not be addressed.

20 THE COURT: I don't understand how that can be so  
21 against defendants who were not exposed to liability the first  
22 time around. Why should the commonwealth be precluded from  
23 seeking that relief against new and different parties?

24 MR. DILLON: Your Honor, speaking for ExxonMobil, my  
25 client, who was in the initial suit --

1 THE COURT: I get that.

2 MR. DILLON: -- that is obviously not an issue for us.

3 THE COURT: No.

4 MR. DILLON: The prior pending action doctrine,  
5 however, holds that to the extent that plaintiffs' interests  
6 were represented in the first suit, and defendants are  
7 obviously defending against those claims to the extent that  
8 they are now in the second action --

9 THE COURT: New defendants?

10 MR. DILLON: New defendants. -- their interests will  
11 be represented as well as in the first as to the islandwide  
12 relief claim.

13 THE COURT: OK. Thank you.

14 Who is arguing for the plaintiffs? Mr. Gilmour?

15 MR. GILMOUR: John Gilmour, your Honor. Your Honor, I  
16 would like to begin, if I may, by addressing the concerns  
17 regarding the two cases that don't go the commonwealth way, to  
18 use the defendants' quote.

19 THE COURT: From Puerto Rico?

20 MR. GILMOUR: Yes, your Honor.

21 THE COURT: OK. Remind me of which two those are.

22 MR. GILMOUR: Yes, your Honor. It's Ocasio and  
23 Cubero.

24 THE COURT: Cubero Aponte.

25 MR. GILMOUR: Yes, your Honor.

1 THE COURT: OK.

2 MR. GILMOUR: The Puerto Rico appellate court, as I  
3 understand it, has 39 justices, and they are divided into 7  
4 geographic regions, judicial regions. These opinions all came  
5 out of the Bayamon region. As you noted, your Honor, it is the  
6 exact same panel. It's not just a single judge. It's the  
7 exact same three-judge panel.

8 Two weeks after the Cubero decision, the exact same  
9 panel decided Gonzalez Rivera, in which they did analyze Arroyo  
10 versus Fraguada, and they did hold that the date of the  
11 original complaint controlled and they did hold that Arroyo  
12 controlled. So they changed their mind, your Honor.

13 THE COURT: I'm sorry. You lost me. So, that same  
14 panel.

15 MR. GILMOUR: That exact same panel, yes, your Honor.

16 THE COURT: What is the name of that case?

17 MR. GILMOUR: Gonzalez Rivera. We provided it to the  
18 Court, your Honor. It is 2014 WL 7370134, and it was October  
19 22, 2014.

20 THE COURT: That same panel then said?

21 MR. GILMOUR: They analyzed Fraguada versus Arroyo and  
22 said that Arroyo applies.

23 THE COURT: Give me a moment. I had Gonzalez Rivera  
24 here. This was a case where there was a voluntary dismissal  
25 based on improper service of the summons, there was a new

1 summons, and the court applies Arroyo to find a refiled claim  
2 not barred because the original case was filed before Fraguada.

3 MR. GILMOUR: Yes, your Honor. Although we can talk  
4 about Puerto Rico II after this, I just wanted to put a  
5 bookmark here because this is an instance where the complaint  
6 after the new summons was issued was filed post-Fraguada. The  
7 issue is that because the original complaint was pre-Fraguada,  
8 Arroyo applied even though --

9 THE COURT: So this isn't an amend complaint at all.

10 MR. GILMOUR: This is a new complaint, your Honor,  
11 yes.

12 THE COURT: They are essentially relating it back.  
13 They are saying there was improper service, here is a new  
14 summons, it's a refiling, so we are going to use the earlier  
15 filed date. That's almost a relation back type argument.

16 MR. GILMOUR: Yes, your Honor. As we will discuss,  
17 the commonwealth's position is that the vast majority of these  
18 cases, and this is not disputed by the defendants, is not only  
19 that five cases hold that the original complaint filing date  
20 controls, it's in excess of a dozen that state that rule.

21 THE COURT: Factually, all dozen are not on point.  
22 Some of those dozen, the original complaint and the amended,  
23 are before Fraguada, for example, so they don't factually fall  
24 into the same pattern.

25 MR. GILMOUR: That's correct, your Honor. If you look

1 through the variety of cases, there are about six different  
2 procedural postures that are before the judges.

3 THE COURT: Correct. Even in Gonzalez Rivera, is it  
4 really fair to say that that same panel reversed itself? Did  
5 it say and we look back on our two decisions in Ocasio Nieves  
6 and Cubero Aponte and say they are wrong?

7 MR. GILMOUR: No, your Honor. If I used the word  
8 "reversed" --

9 THE COURT: I don't think you did. I'm just asking  
10 you. You are saying they took a different position but not on  
11 identical facts. I think there one filing predated Fraguada.  
12 The summons was bad, they refiled it and said essentially it  
13 relates back.

14 Is that what you are going stand and say, Mr. Wallace?

15 MR. WALLACE: Yes, your Honor. I don't read the cases  
16 even involving filing a new complaint. I think you're quite  
17 right that the court simply issued a new summons to the correct  
18 address.

19 THE COURT: Correct.

20 MR. WALLACE: None of these cases concern the issue  
21 before you where cause of action is first asserted after  
22 Fraguada.

23 THE COURT: Go ahead, Mr. Gilmour.

24 MR. GILMOUR: Your Honor, I can go through them if you  
25 want, but I think the most important thing is to focus on the



1 five that are procedurally and factually similar to our case.

2 THE COURT: Correct.

3 MR. GILMOUR: Mr. Wallace stated that he had concern  
4 about the use of the phrase "cause of action" in Fraguada and  
5 afterwards. Judge, you and I have had this discussion before.  
6 I don't want to belabor the point. But part of the challenge  
7 that we all face in this case is that these cases are all in  
8 Spanish. They are being translated.

9 Early on we tried to reach agreement amongst the  
10 parties to use a single translator or translation service. We  
11 were unable to reach that agreement. So we have multiple  
12 translations going back and forth. I don't want to get into  
13 the factual challenge of one translation versus another, but I  
14 would say I think what we are seeing here is an issue of  
15 translation.

16 What clarifies that for us is the post-Fraguada cases  
17 that we have given your Honor -- again not universally, there  
18 are some outliers that we discussed -- the vast majority state  
19 the rule that the date of the original complaint controls  
20 whether Arroyo applies or whether Fraguada applies. It states  
21 in those five that are in our favor according to defendants  
22 that that is so even where the complaints filed pre-Fraguada  
23 and the amended complaint is filed post-Fraguada.

24 THE COURT: I think you gathered from my discussion  
25 with Mr. Wallace that I would be troubled if five years after

1 Fraguada you file an amended complaint relying on Arroyo. That  
2 would be troubling to me. But within that one year, as of now,  
3 waiting to see what I might get in the letter, thinking about  
4 Mr. Wallace's argument, I'm inclined to say you have to at  
5 least get that year. Which, frankly, covers you. If you win,  
6 you win, you don't really care how you win. So that's that.

7 With respect to Puerto Rico II, I think we must all  
8 agree that's a new case filed post-Fraguada, so it's not really  
9 part of this discussion. It's either time-barred or not time-  
10 barred other than issue where there is this duplicative relief  
11 and the prior pending action controls, which has nothing to do  
12 with Fraguada or Arroyo, it is just unrelated. So the Puerto  
13 Rico II argument is really not an Arroyo/Fraguada argument, is  
14 it?

15 MR. GILMOUR: It is, your Honor, as far as limitations  
16 is concerned.

17 THE WITNESS: Why?

18 MR. GILMOUR: Because under Arroyo the filing of an  
19 original complaint against even, say, one co-tort feasor tolls  
20 the claims against all tort feasors that are jointly and  
21 severally liable, even those that are not joined in that suit.  
22 Under Arroyo, the First Circuit addressed an issue in the  
23 Suzuki case where there was a suit filed against two  
24 defendants, it was voluntarily dismissed, it was later filed as  
25 to a completely different defendant, and Arroyo was applied and

1 said that the limitations were tolled as to that later-added  
2 defendant by the date of the original complaint against the  
3 other two defendants.

4 THE COURT: Even though the new case was not an  
5 amended complaint, was it was a new case against a different  
6 defendant, but for the same injury?

7 MR. GILMOUR: Yes, your Honor.

8 THE COURT: That court obviously had no Fraguada issue  
9 to contend with.

10 MR. GILMOUR: Yes, your Honor.

11 THE COURT: That was that court's interpretation of  
12 the Arroyo at the time.

13 MR. GILMOUR: Yes, your Honor.

14 THE COURT: I understand that.

15 MR. GILMOUR: The commonwealth's position is that by  
16 filing the initial complaint in 2007, it tolled limitations as  
17 to all co-tort feasors for that injury.

18 THE COURT: Basically ad infinitum, for eternity.

19 MR. GILMOUR: Yes, your Honor.

20 THE COURT: I can't believe that is a fair  
21 interpretation of Fraguada, either. Fraguada henceforth, in  
22 other words, from the date of its assurance, takes effect. The  
23 real issue to me is that year given the reliance for the toll  
24 period. Fairness tells me you get a year. To think that you  
25 get in perpetuity under the Arroyo rule would make a bit of a

1 mockery out of the Fraguada decision, which meant to eliminate  
2 Arroyo.

3 After you get that year, then it is certainly fair to  
4 shut it down. But it is not much of an issue in Puerto Rico II  
5 except for the duplicative relief issue. If you found new  
6 people and the statute didn't run until you knew or should have  
7 known of them and you're timely within a year, you're OK  
8 anyway.

9 It's the islandwide relief claim, which is not a  
10 Fraguada argument. Mr. Dillon argues the prior pending action  
11 doctrine says that if your interests were represented as  
12 plaintiff, and they are, and the interests of the new  
13 defendants are the same as the interests of the old defendants,  
14 and so they are fairly represented, you don't get to seek that  
15 relief in a second action. That's how he summarized the prior  
16 pending action doctrine.

17 MR. GILMOUR: I agree with that summary, your Honor.  
18 What I would disagree with, my understanding is that defendants  
19 are complaining claims versus relief.

20 THE COURT: Yes. He says you sought the same relief  
21 in Puerto Rico I; it doesn't matter that you are adding timely  
22 defendants in the sense of new sites, but you are seeking the  
23 same relief that you sought in the first case and their  
24 interests are protected by the original group of defendants.  
25 Your interests are surely represented, you are the same

1 plaintiff.

2 MR. GILMOUR: A few things, your Honor. One, we have  
3 seen in prior cases in this very MDL that the relief cannot be  
4 dismissed, it's the claim. So the conversation that we have  
5 been having for some time is claim versus relief. I would  
6 argue that the prior pending action doctrine is applicable to a  
7 claim, not to sought relief. The relief is at the discretion  
8 of the trial judge at the end of the day, what relief is  
9 granted.

10 So I think there is certainly protection there that  
11 there will not be double recovery. In this case they say  
12 islandwide relief, your Honor. We prefer to call it nonsite-  
13 specific remedies.

14 THE COURT: I understand.

15 MR. GILMOUR: We are looking to clean it up. The  
16 issue is that it is not going to be duplicative. I assure you,  
17 and I'm stating it on the record, we do not want to try any  
18 issues twice. To the extent the issue is in Puerto Rico I as  
19 to all relevant defendants, we are done with that issue. To  
20 the extent that it is not and Puerto Rico II remains a separate  
21 triable case, especially as to new defendants, then we have to  
22 preserve that. Defendants, as they have moved, have sought the  
23 dismissal of the entire case or the entire claim against all  
24 the defendants, which greatly prejudices the commonwealth,  
25 particularly as to the 17 newly added defendants.

1 THE COURT: Anything further, Mr. Gilmour?

2 MR. GILMOUR: Not unless you have any questions.

3 THE COURT: What is your view of my evolving thought  
4 that once Fraguada comes down, you are subject to the end of  
5 the tolling from Arroyo but now you are getting a year?

6 MR. GILMOUR: Your Honor, the way that I read the  
7 cases is that there is a bright-line rule and it's the date of  
8 filing of the original complaint. I hear you, your Honor, that  
9 you feel that there is some unfairness that that would allow  
10 tolling ad infinitum. But the Court has procedural rules in  
11 place to prevent injustice. For example, we could not amend  
12 tomorrow without seeking permission from the Court. We would  
13 have to state our bases for amending the complaint tomorrow in  
14 Puerto Rico I. Your Honor at the end of the day can agree or  
15 disagree.

16 THE COURT: When you amended Puerto Rico I on December  
17 3, 2012, how did you get to do that procedurally? Was it  
18 stipulated? Was there a contested motion? How did you get the  
19 Court's permission then?

20 MR. GILMOUR: It was requested, your Honor. I know it  
21 was discussed in some of the case management conferences.  
22 That, unfortunately, is slightly prior to my involvement in the  
23 case.

24 THE COURT: The only reason I asked is I wondered  
25 whether it was contested and I wrote a decision or the

1 defendants just went along at that point in time. Under Arroyo  
2 they knew the argument. I don't remember. Do any of the  
3 defense counsel remember?

4 MR. WALLACE: As I recall it, your Honor, the  
5 plaintiffs requested it in a letter exchange, and at a  
6 conference and you indicated that if the defendants  
7 contested --

8 THE COURT: They could always move to dismiss.

9 MR. WALLACE: Exactly.

10 THE COURT: I always say that on amended complaint  
11 cases. I say there are two ways to do it procedurally: Either  
12 propose to amend or get it filed and then move to dismiss. So  
13 I don't think there is any waiver there, that's for sure.

14 With respect to your argument about protection, it  
15 doesn't really apply because I didn't consider the merits of  
16 this argument at that time but reserved the defendants' right  
17 to move, which they now have.

18 MR. GILMOUR: Yes, your Honor. I mean going into the  
19 future.

20 THE COURT: I understand. You're saying this time  
21 around if we want to amend next week, they would again say it's  
22 time-barred, and I would be where I am today hearing argument  
23 on that issue. Since I have always said procedurally it's the  
24 same to me whether they oppose leave to amend or just move to  
25 dismiss it, procedurally I have always preferred the latter:

1 Get the thing filed, make your argument, you haven't waived  
2 anything, and I'll rule. So that doesn't impress me as a major  
3 argument.

4 MR. GILMOUR: If I may, your Honor, it wouldn't have  
5 to be a time bar argument.

6 THE COURT: No, right.

7 MR. GILMOUR: The Court could simply find that it's  
8 unfair to defendants, it's prejudicial to them, etc., and deny  
9 leave to amend. It's an entirely different legal issue than  
10 tolling.

11 THE COURT: Yes and no. It could be a laches  
12 argument, which is very similar.

13 MR. GILMOUR: Yes, your Honor.

14 THE COURT: It raises all the same fairness issues of  
15 whether you waited too long. I think it is two sides of the  
16 same coin, but I appreciate your point.

17 I asked your response to that position. Your response  
18 is we don't like that one, either, we think we have Arroyo  
19 tolling continually because our original complaint was filed  
20 prior to Fraguada.

21 MR. GILMOUR: In sum, your Honor, yes.

22 THE COURT: Thank you.

23 Anybody else? Mr. Dillon.

24 MR. DILLON: Your Honor, just one point on Puerto Rico  
25 II with regard to filing of a new complaint. I know that



1 several of the cases plaintiffs have cited suggest that  
2 Fraguada applies to bar new actions -- Soto Lopez, Torres  
3 Rodriguez, Ramos Miranda, and the Tartak case -- and we submit  
4 so does Fraguada itself.

5 THE COURT: Say that again. You lost me.

6 MR. DILLON: Sure. The order issued by the court in  
7 Fraguada also bars those prospectively, a new action.

8 THE COURT: The order in Fraguada?

9 MR. DILLON: At the end of Fraguada, your Honor.

10 THE COURT: Says what? I don't really know what we  
11 are talking about. It can't be right on the 36 new sites.  
12 That's not joint and several, either. Those are new sites, new  
13 defendants, are they not? Or is that a matter of old sites,  
14 new defendants? What is the 36 new sites?

15 MR. DILLON: 17 were old, your Honor.

16 THE COURT: 17 what?

17 MR. DILLON: 17 sites were old.

18 THE COURT: They are now new defendants?

19 MR. DILLON: They were separated and actually poured  
20 back into the Puerto Rico I case. So it is not truly 36 new  
21 sites. There were also new defendants in Puerto Rico II and  
22 old defendants.

23 THE COURT: I'm sorry. There are sites in Puerto Rico  
24 II that were in Puerto Rico I, but now they are adding  
25 defendants, is that what you are saying?

1 MR. DILLON: That's correct.

2 THE COURT: That would be a joint and several issue  
3 that you would say would be controlled by Fraguada. There are  
4 also new sites that were not in Puerto Rico I.

5 MR. DILLON: That's right.

6 THE COURT: I don't see that that can be a Fraguada  
7 issue. OK, I understand. There are both fact scenarios in the  
8 new complaint.

9 MR. HARRIS: If I might be heard very briefly on the  
10 tolling grace period issue. We will probably cover this in the  
11 letter, but I think it is important to focus on the fact that  
12 the rule of Fraguada was you look at when the cause of action  
13 accrues and you have a year.

14 THE COURT: I know, but it can't be in the tolled  
15 year. There was tolling in place. That's what tolling is.

16 By the way, this has all been hashed out in class  
17 action litigation. When the class is not certified, you get  
18 the year. You know that. When the toll is in place, the year  
19 isn't running. I don't think I want further argument. Think  
20 about the together analogy.

21 I forget the controlling case, but everybody knows it.  
22 I just forget the name. I wouldn't have forgotten ten years  
23 ago, darn it. Then, I remembered all names. But no longer.  
24 Who knows the name of that case? Nobody? It's a very famous  
25 case. When it was tolled, it was tolled. Then if you don't

1 certify, you get the year. Somebody will think of it. Not  
2 important. It just shows we are all in the same shape. Mr.  
3 Pardo, even you.

4 MR. PARDO: I'm right there with you.

5 THE COURT: Is there anything further on this  
6 argument? Mr. Gilmour?

7 MR. GILMOUR: Your Honor, if I might ask, I just have  
8 to ask, I don't know that a letter would be required, but if  
9 defendants are going to file a letter in the week, may the  
10 commonwealth be afforded the opportunity to respond if it feels  
11 necessary?

12 THE COURT: Yes but. You have already told me your  
13 position. You have already said, you're on the wrong track,  
14 Judge, it's not a matter of a year or not a year, if the  
15 complaint was filed pre-Fraguada, we're tolled in perpetuity,  
16 that's our position.

17 I suppose you could argue alternatively, yes, we were  
18 entitled to the year and then you will site that class action  
19 case I can't think of and say under that analogous rule we  
20 should get the year. I can imagine what the letter will say.  
21 It will be one paragraph citing one case, but that's fine. You  
22 can have it, too.

23 If you get a letter and you want to say what I just  
24 said, as an alternative we get the year, please get it in the  
25 at the absolute latest October 30th. Although I don't think it

1 takes a week to write that, since I just dictated it.

2 MR. GILMOUR: Understood. Thank you, your Honor.

3 THE COURT: Is now is there anything else?

4 MR. KAUFF: Your Honor, I want to ask the Court, Mr.

5 Dillon spoke about the prior pending action arguments.

6 THE COURT: Yes, he did.

7 MR. KAUFF: I wanted to ask, do you want our argument  
8 on that point or only on the statute of limitations aspects of  
9 it?

10 THE COURT: You mean now, your oral argument?

11 MR. KAUFF: Right.

12 THE COURT: Do you mean do you want to hear argument  
13 now?

14 MR. KAUFF: Correct.

15 THE COURT: Sure, go ahead.

16 MR. KAUFF: He went beyond the statute of limitations.  
17 First, I want to point out the distinction between a claim and  
18 relief as was discussed before. But in addition, the  
19 defendants, in their prior pending action doctrine argument,  
20 ignored the Second Circuit's decision in Devlin, where the  
21 Second Circuit said there's an exception to the prior pending  
22 action doctrine.

23 THE COURT: That exception is?

24 MR. KAUFF: The exception is where the two cases are  
25 before the same judge, that judge should consider consolidation

1 in lieu of dismissal. It remanded that case back and the  
2 court, this court, did consolidate the action. That same  
3 Devlin decision has now been followed by the Southern District  
4 of New York in subsequent cases where the same judge is hearing  
5 those cases.

6 In lieu of dismissal, which is what the defendants are  
7 requesting, in this extreme case where we have 17 new defendant  
8 and new sites, the solution here is consolidation. That's why  
9 we have a pending motion to consolidate, as your Honor  
10 discussed at the last case management conference. I just  
11 wanted to bring that to the Court's attention.

12 THE COURT: Thank you, Mr. Kauff.

13 Now is there anything further from anyone? No. Thank  
14 you.

15 (Adjourned)  
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